Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BOB BAFFERT,

Petitioner,

v.

CALIFORNIA HORSE RACING BOARD, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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79 pp

QUESTION PRESENTED

Whether in violation of the uniform holdings of this Court and settled principles of constitutional law as enunciated *in Mitchum v. Foster*, 407 U.S. 225, 242, 32 L.Ed. 2d 705 (1972), and *Pennhurst State Sch. Hosp. v. Halderman,* 465 U.S. 89, 103-105, 79 L.Ed. 2d 67 (1984) (citing *Ex Parte Young,* 209 U.S. 123, 52 L.Ed. 714 (1908)), the Ninth Circuit improperly applied the *Younger* abstention doctrine and improperly reversed the District Court's Judgment solely on the ground of lack of jurisdiction under *Younger v. Harris*, 401 U.S. 37, 27 L.Ed. 2d 669 (1971), where Petitioner's 42 U.S.C. §1983 action and the District Court's Judgment were based on Respondents' secret and intentional destruction of exculpatory evidence in the case, blood samples, before Respondents filed their accusation against Petitioner in a state agency administrative disciplinary proceeding, in violation of Petitioner's due process right to a fair hearing under the principles of *California v. Trombetta*, 467 U.S. 479, 480-489, 81 L.Ed. 2d 413 (1984) and *Brady v. Maryland*, 373 U.S. 83, 87, 10 L.Ed. 2d 215 (1963) (hereinafter "*Trombetta/Brady*").

PARTIES TO THE PROCEEDINGS

The parties in these proceedings are the Petitioner, BOB BAFFERT, America's leading trainer of thoroughbred race horses (hereinafter "Petitioner"), and the Respondents, the CALIFORNIA HORSE RACING BOARD (hereinafter "CHRB" or "Board") and its members, John C. Harris, Sheryl L. Granzella, Marie G. Moretti, Alan W. Landsburg, William A. Bianco and Roger H. Licht[1] and the CHRB's Executive Director, Roy C. Wood Jr., in their official capacities.

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[1] Robert Tourtelot, named in the District Court action as a Defendant, was no longer a Board member when Petitioner filed his 42 U.S.C. § 1983 action, and Mr. Tourtelot was dismissed at the trial level.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

Opinion Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 3

Factual Background and Procedural History 5

REASONS FOR GRANTING THE PETITION 14

CONCLUSION 29

APPENDICES 1a-41a

TABLE OF AUTHORITIES

Page

Federal Cases

Aiona v. Judiciary of Haw.,
17 F.3d 1244 (1994).....26

Brady v. Maryland,
373 U.S. 83, 10 L.Ed. 2d 215 (1963).....i, 2, 3, 4, 9,
..... 13, 14, 17, 18, 19, 22, 23, 24, 25, 27, 28, 29, 30

Butler v. Alabama Judicial Comm.,
245 F.3d 1257 (2001).....19

California v. Trombetta,
467 U.S. 479, 81 L.Ed. 2d 413 (1984).....i, 2, 3, 4, 9,
..... 13, 14, 15, 17, 18, 19, 22, 23, 24, 25, 27, 28, 29, 30

Ex Parte Young,
209 U.S. 123, 52 L.Ed. 714) (1908) .....i, 16

Gibson v. Berryhill,
411 U.S. 564, 36 L.Ed. 2d 488 (1973).....4, 5, 15,
..... 18, 20, 22, 23, 25, 27, 28

Gilliam v. Foster,
63 F.3d 287 (1995).....27

Kugler v. Helfant,
421 U.S. 117, 44 L.Ed. 2d 15 (1975).....4, 23

Lugar v. Edmondson Oil Co.,
457 U.S. 922, 73 L.Ed 2d 482 (1982).....15

Mannes v. Gillespie,
967 F.2d 1310 (1992).....3, 23, 24, 27, 28

Miofsky v. Superior Court (California),
703 F.2d 332 (1983).....16

TABLE OF AUTHORITIES

Page

Federal Cases (cont)

Mitchum v. Foster,
407 U.S. 225, 32 L.Ed. 2d 705 (1972).....i, 15, ... 16, 19, 22

Monroe v. Pape,
365 U.S. 167, 5 L.Ed 2d 492 (1961).....17, 29

Office of Hawaiian Affairs v. Department of Education,
951 F.Supp 1484 (D. Haw. 1996).....16

Pennhurst State Sch. Hosp. v. Halderman,
465 U.S. 89, 79 L.Ed. 2d 67 (1984).....i, 16

Wyatt v. Cole,
504 U.S. 158, 118 L.Ed 2d 504 (1992).....15, 29

Younger v. Harris,
401 U.S. 37, 27 L.Ed. 2d 669 (1971).....i, 2, 3, 4, ... 16, 17, 18, 19, 21, 22, 23, 26, 27, 28, 30

California State Cases

Abelleira v. District Court,
17 Cal. 2d 280 (1941) 21

Board of Med. Quality Assur. v. Superior Court,
73 Cal.App. 3d 860 (1977) 21

Scott v. Meese,
174 Cal.App. 3d 249 (1985) 15

Federal Statutes

28 U.S.C. §1254(1).....2

42 U.S.C. §1983..... i, ii, 1, 3, ... 5, 13, 15, 16, 20, 21, 22, 25, 27, 28, 29

42 U.S.C. §1988.....14

TABLE OF AUTHORITIES

Page

California State Statutes

Business and Professions Code §19431 10
Business and Professions Code §19580 5
Government Code §11517 .....4, 17, 19, 20, 21
Public Contract Code, §10335(a).....10

California State Regulations

C.C.R. §1843 .....6, 11
C.C.R. §1843(d).....24
C.C.R. §1843.1 6
C.C.R. §1858 .....5, 12
C.C.R. §1859.25(a).....10
C.C.R. §1887 (The Trainer Insurer Rule) 11, 12,
.....23, 25, 29
C.C.R. §1888 25

Miscellaneous

CHRB's Horsemen's Handbook 12

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BOB BAFFERT,

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bob Baffert respectfully petitions this Honorable Court for a Writ of Certiorari to review the Opinion and Decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The Opinion of the Ninth Circuit was filed on June 6, 2003 [App. A, 1a-15a], remanding the case to the District Court with instructions to vacate the award of attorney fees and dismiss Petitioner's 42 U.S.C. §1983 action. **The Decision of the Ninth Circuit is based solely on the jurisdictional principles of *Younger* abstention.** [*Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669 (1971).] Petitioner's civil rights action and the District Court's Judgment were based on the CHRB's secret and intentional destruction of exculpatory evidence, blood samples, in violation of *Trombetta/Brady*, thus depriving Petitioner of a constitutionally fair administrative trial. The Ninth Circuit did not address the merits of Petitioner's

constitutional *Trombetta/Brady* argument, nor did it address the impact of the *Trombetta/Brady* violation on the exceptions to *Younger* abstention, extraordinary circumstances and bad faith. If the Ninth Circuit had recognized the impact of *Trombetta/Brady* on *Younger* abstention, it should not have concluded that the CHRB "had a 'reasonable' expectation of obtaining a valid 'conviction'" in this case.[2] [App. A, 13, 14a.]

JURISDICTION

Petitioner filed a petition for rehearing in the Ninth Circuit. This petition was denied on July 16, 2003. [App. B, 16a.] This Court has jurisdiction under the provisions of 28 U.S.C. §1254(1), and Supreme Court Rule 10 (c).

STATUTORY PROVISIONS INVOLVED

This case arises under the civil rights provisions of 42 U.S.C. §1983 which provide in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ... [App. C, 18a.]

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[2] This was the basis of the District Court's exercise of jurisdiction. [EOR III, 696-698.] The references to "EOR" are to the record before the Ninth Circuit of the Administrative and District Court proceedings.

STATEMENT OF THE CASE

Petitioner's 42 U.S.C. §1983 action was predicated on the prosecutorial state agency's, the CHRB's, secret and intentional destruction of exculpatory evidence, both blood samples, thereby completely preventing Petitioner from having a fair administrative proceeding in violation of his constitutional right to due process under the Fourteenth Amendment (App. C, 17a) as required by this Court's decisions in *California v. Trombetta* and *Brady v. Maryland* ("*Trombetta/Brady*").[3]

Petitioner respectfully submits that the Ninth Circuit erred in relying on *Younger* abstention. The Ninth Circuit's Decision conflicts with its own holding that **threshold constitutional issues,** such as double jeopardy, are "extraordinary circumstances" requiring the federal courts to accept jurisdiction in spite of *Younger*. [*Mannes v. Gillespie*, 967 F. 2d 1310, 1312 (1992).] **Petitioner submits that *Trombetta/Brady's* constitutional principle (the state's duty to preserve exculpatory evidence) is also a threshold issue of "extraordinary circumstances" requiring the federal courts to decline *Younger* and accept jurisdiction.**

The Ninth Circuit also erred when it failed to consider the impact of the constitutional principles of *Trombetta/Brady* on the "bad faith" issue under *Younger*. [App. A, 13a-14a.] It is undisputed that the CHRB, a state agency, intentionally failed to preserve highly material exculpatory evidence which would have rebutted presumptions relied on by the CHRB to support

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[3] *California v. Trombetta*, 467 U.S. 479, 489, 81 L. Ed. 2d 413 (1984); *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d. 215 (1963).

its case against Petitioner.[4] Obviously, Petitioner lost any chance to adequately defend himself when the State intentionally destroyed the blood samples. **Since this breach of constitutional duty required a dismissal of the charges under *Trombetta/Brady* before trial [467 U.S. 487], the CHRB's administrative action was obviously brought without a reasonable expectation of obtaining a valid conviction.** [See *Kugler v. Helfant*, 421 U.S. 117, 124, 126 fn.6, 44 L. Ed. 2d 15, 24, 25 fn.6 (1975).]

In addition, the Ninth Circuit erred in concluding that the California administrative procedures (Government Code §11517, App. E, 22a) provide for adequate and timely review of the constitutional issues raised by *Trombetta/Brady* in this case. [App. A, 9a-13a.] This Court stated in *Gibson v. Berryhill*, 411 U.S. 564, 36 L. Ed. 2d 488 (1973), that since *Younger* "contemplates the outright dismissal of the federal suit, and presentation of [the federal] claims...to the state courts...such a course naturally presupposes the opportunity to raise and have **timely decided** by a **competent state tribunal**, the federal issues involved." [*Id.* at 577. Emphasis added.] Patently the multilayered state administrative system under Government Code §11517 prohibits a timely decision in this case; and a legitimate question is raised as to the competency of the state tribunals, a Board of Stewards and the "Board" (all lay persons), to decide federal constitutional issues in the context of this and similar cases.

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[4] The Ninth Circuit relied on these same presumptions in finding under *Younger* that the CHRB had a "reasonable expectation of obtaining a valid conviction." [App. A, 14a, discussed *infra*, p.23.]

Petitioner urges that this case presents questions of exceptional importance affecting not only Petitioner, but all persons who may be similarly situated and accused of a violation of law after the state agency has intentionally destroyed exculpatory evidence. The most important question presented is the Constitutional right to have access to scientific evidence in the state's possession, material to the state's charge. Obviously, when a state agency intentionally destroys scientific evidence in its possession before bringing any charges against its citizens, the resulting constitutional issues of due process must be timely and adequately addressed in a meaningful way. Only federal intervention under 42 U.S.C.§1983 can provide meaningful protection for these constitutional rights. [*See Gibson v. Berryhill,* at 577-580.] The Ninth Circuit did not adequately or properly address these issues.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

After every California thoroughbred race, **urine and blood samples** are collected from the winner and two other randomly selected horses. [C.C.R.[5] § 1858, App. F, 31a.] **Both samples** are required to be analyzed by the CHRB's official laboratory for the presence of prohibited substances in compliance with California's Horse Racing Laws (Business and Professions Code §19580, App. E, 20a), and the CHRB's Equine

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[5] California's Code of Regulations ("C.C.R."). These regulations and all referenced State statutes appear in the Appendices as Appendix E and F.

Medication Regulations (C.C.R. §§1843, 1843.1, App. F, 28, 30a), as well as the CHRB's publicly bid contract with Truesdail Laboratories.[6] [EOR I, 221-225.]

On May 3, 2000, "Nautical Look", trained by Petitioner, won the 7th Race at Hollywood Park.[7] Following the race, two vials of blood and a urine sample were collected from Nautical Look. The urine sample was divided into two containers. One vial of blood and one container of urine (the "official" samples) were sent to Truesdail Laboratories. [EOR IV, 846, 877.] The other vial of blood and urine container were sent to the CHRB's "Split Sample Unit" in Sacramento for storage and safe keeping. [EOR IV, 877.]

However, both vials of blood were secretly and intentionally destroyed on orders and by action of the CHRB's staff without ever having been tested, and even before the Agency's accusation was filed against Petitioner. [EOR II, 291:26-292:9, 300:12-27, 309:12-23; EOR IV, 878, 900.]

The CHRB has a publicly bid contract [EOR I, 225, 226] with Truesdail Laboratories providing for the testing of both the blood and urine samples taken after every race, which specifically provides:

> **In the event that an analytical finding is made in a post race urine sample the corresponding blood sample must also be**

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[6] Obviously, these facts supported the District Court's findings that the CHRB had a duty to preserve the blood samples for their exculpatory value. [*Infra*, pp. 10-14.] Both the Stewards and the Ninth Circuit ignored these factors.

[7] There was no "betting coup". The horse was favored to win according to the "morning line". [EOR IV, 835-836]

> **further tested for the presence of the compound found in the urine sample....** Samples having chemical test findings are to be retained in secure frozen storage until the case has been completely resolved ...."[8] [Emphasis added.]

None of these requirements were met in this case.

Dr. Norman Hester, Truesdail's Director, testified before the Board of Stewards that Nautical Look's **blood sample was not tested; rather, the official blood sample was intentionally destroyed without testing before the urine sample was tested.** [EOR II, 291:26-292: 9, 300:12-27, 309:12-23.]

Dr. Hester testified further that the publicly bid contract between the CHRB and Truesdail had been **modified by an internal "memo" from a CHRB employee** allegedly permitting Truesdail to randomly throw away one-third of all blood samples it received from the California race tracks and **disregard that part of their contract requiring the laboratory to confirm, by an appropriate test of the blood, the presence of the alleged prohibitive substance found in any urine sample.**[9] [EOR II, 291:26-292:28; EOR III, 647.]

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[8] Obviously, if the urine sample contained a prohibited substance, it is likely the blood sample would contain the same substance, if the urine test was accurate. [EOR III, 783-787.] Thus the blood sample should have been "retained" "until the case has been completely resolved."

[9] The unfairness to some trainers is obvious and raises serious questions of equal protection of the laws. Some trainers (whose blood samples are destroyed) are likely to have their licenses affected by a positive urine test, while other trainers would not because their blood samples were preserved and tested negative.

Dr. Ronald C. Jensen, the CHRB's Equine Medical Director, testified that in addition to the destruction of the blood sample by the official laboratory, the CHRB's staff also **intentionally destroyed on June 28, 2000, the split blood sample** held in an evidence locker in Sacramento. [EOR IV, 900, 878-880.] **This occurred after the CHRB had been notified (on May 16, 2000) by Truesdail that the urine sample had tested positive** (EOR IV, 947), **and even before the Complaint was filed against Petitioner on August 14, 2000.** [EOR III, 646.] Neither Petitioner, nor any other horsemen, were notified of the changes in the CHRB's testing practices, or of the destruction of blood samples. [EOR IV, 875-876.]

The CHRB produced an August 17, 1999 memorandum and a similar one dated August 21, 2000 (EOR III, 647, 648) from Roy Minami, a CHRB staff member, allegedly authorizing Truesdail to destroy blood samples.[10] **This action, however, was never approved or authorized by the Board**. Minami is quoted in the February 16, 2002 article in "The Blood-Horse," an international thoroughbred breeding and racing publication [EOR IV, 901], as stating in reference to his memos: "At the time we didn't feel we needed the Board to approve that. . . I was under the direction of the Chairman to restructure the contracts to make things go." However, Ralph Scurfield, the Board Chairman in 1999, is quoted in the same article as stating: "I did not

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[10] The Ninth Circuit referred to this fact as "policy." [App. A, 5a.] As stated herein (pp. 8-10), this was certainly not Board policy, as the Board never discussed the destruction of blood samples with anyone, did not vote on such a historical change in its testing policy, and did not authorize the Staff's action.

have a conversation on that topic." The article further states: "Neither Scurfield nor the other three commissioners who constituted the Board at that time recall voting on or talking about changing the way blood is tested." [EOR IV, 904.] Robert Tourtelot, the Chairman of the Board in 2000 is quoted in the same Blood-Horse article as follows:

> ***I didn't give Minami the authority to write that letter. It never came before the Board.... It's ridiculous to throw out blood that is connected to cases still under consideration. It's a question of destroying potential evidence. We screwed up. Staff did something beyond [its] authority.*** [EOR IV, 904. Emphais added.]

Dr. Jensen, testified that he did not discuss this "policy" change with the Board, and he was unaware of any Board action on this "policy". [EOR IV, 875:5-876:1.] Despite these facts, the Board of Stewards found no fault with the destruction of the blood samples in denying Petitioner's Motion to Dismiss the Accusation under *Trombetta/Brady*.

> While the Stewards are concerned about the circumstances leading to Truesdail Laboratories randomly discarding blood samples, it is our position that the lack of blood samples did not warrant a dismissal of the case before us. [EOR I, 55.]

Obviously, lay judges, who were advised by the prosecutor (the California State Attorney General's office) on legal issues, would be hard pressed to make any other decision.

In addition to being a clear violation of state law[11] and Petitioner's Constitutional rights, this secret policy was in direct contravention of the California Legislature's statutorily enacted legislative intent in its delegation of regulatory authority to the CHRB. California Business and Professions Code, regulating the Horse Racing Industry and the CHRB's equine medication policies and practices, specifically provides in § 19580 as follows:

> (a) It is the **intent of the Legislature** that the board, in its testing efforts to determine illegal or excessive use of substances, **recognize the greater importance of conducting complete and thorough testing of a lesser number of samples in preference to conducting less thorough testing on a greater number of samples.** [App. E, 20a. Emphasis added.]

Additionally, the Regulations impose a duty on the CHRB to preserve blood samples as evidence. C.C.R. §1859.25(a) [App. F, 34a] states in part: **"The Board shall ensure the security and storage of the split sample."** [Emphasis added.] Obviously, as the Board's contract provides, all samples should be retained "until the case has been completely resolved." [EOR I, 226.]

These laws, regulations, common sense and Constitutional requirements of fairness mandate that the "**Board**" (the CHRB) is under a distinct duty to preserve

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[11] Modification of agency publicly bid contracts must comply with the provisions of California's Public Contract Code, §10335(a) [App. E, 26a], and policy changes by the Agency must be voted on by the Board as required by Business and Professions Code §19431. [App. E, 21a.] As stated above, none of these requirements were met.

all blood and urine samples until the case has been fully heard and decided by all appropriate judicial and quasi-judicial bodies. Obviously, it is vitally important that the blood samples be maintained, since they contain the **only direct and scientific exculpatory evidence in defense of the "Trainer Insurer Rule"** (C.C.R. §1887, App. F, 37a), a fact that even the Board of Stewards reluctantly recognized in its Decision (EOR I, 55), and specifically recognized by Robert Tourtelot, the Board Chairman in 2000. [*Supra*, p. 9.]

As both prosecutors and judges at the Stewards' Hearing, the CHRB introduced the urine report from Truesdail Laboratories. [EOR IV, 906.] Since the imposition of a penalty is discretionary, not mandatory, under horse racing Board rules (App. F, 37a), the Board of Stewards, and the Board itself in this case, must rely on other evidence to determine and justify the imposition of any penalties for a violation. To support this requirement, the CHRB charged in its Complaint [EOR III, 646] and relied on §1843 of the CHRB's Regulations, which provides in pertinent part:

> (d) A finding ... that a test sample ... contains a [prohibited] substance ... **shall be *prima facie* evidence that the trainer ... has ... been negligent in the care of the horse and is *prima facie* evidence that the drug substance has been administered to the horse.**[12] [App. F, 28a. Emphasis added.]

Obviously, after the prima facie showing under §1843(d), the trainer should have the opportunity to

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[12] The Ninth Circuit relied on these same presumptions to support its conclusion that the CHRB had a reasonable expectation of securing a valid conviction. [App. A, 14a.]

present evidence to rebut these presumptions. However, the prosecuting authority, the CHRB, intentionally destroyed all of the blood evidence before it was even examined or tested, thus depriving Petitioner of his constitutionally guaranteed opportunity.

Expert testimony was introduced at the Stewards' Hearing from Dr. Steven A. Barker, Louisiana State University's School of Veterinary Medicine and the State Chemist for the Louisiana Racing Commission, that if the blood samples had been preserved and tested quantitatively for the presence of morphine, a negative result or a low level presence of morphine in the blood sample would have been **conclusive evidence that there had been no pre-race administration** of morphine to the horse by Petitioner or his employees. [EOR IV, 973. See also Dr. Barker's Declaration in support of Petitioner's Motion for Summary Judgment. EOR III, 783-787.]

Dr. Barker also testified that a test of the blood sample would support an evidentiary finding that even if the estimated low level trace finding of 73 nanograms of morphine was actually in the urine, it would likely be an unavoidable result of accidental environmental contamination (EOR III, 785-786), a mitigating circumstance in defense of the Trainer Insurer Rule, as set forth in the Horsemen's Handbook published by the CHRB. [App. G, 39a.] Only the testing of both the blood and urine samples, which has been established policy for over 50 years in California racing (C.C.R. §1858 App. F, 31a), could confirm the presence of the substance in any quantity in a horse's system. It is therefore obvious that the CHRB knew that the blood sample contained potentially material exculpatory evidence, a requirement under *Trombetta*. [467 U.S. at

488.] The CHRB obviously knew that Petitioner would not be able to challenge the urine finding without scientific evidence provided by the blood samples. Yet, the CHRB intentionally and secretly destroyed this evidence, held at two different locations, before filing its accusation against Petitioner. This intentional conduct by the CHRB has deprived, and continues to deprive, Petitioner of his Constitutional right to a full and fair administrative proceeding and to the Constitutional right that he be afforded the opportunity to present evidence to meet and rebut the Agency's accusation and evidence. These undisputable facts mandate and fully support the District Court's assumption of jurisdiction and justification for the issuance of a permanent injunction by summary judgment in this case under the civil rights provisions of 42 U.S.C. §1983.

Following the Board of Stewards' Hearing, the Stewards ordered that Petitioner's license be suspended for sixty days. Petitioner timely appealed to the CHRB. When the CHRB Chairman denied Petitioner's request for a stay pending administrative appeal, a stay was obtained from the California State Superior Court on a petition for writ of mandate.

Petitioner filed his federal action under 42 U.S.C. §1983 against the CHRB's Board members in their official capacities. The federal complaint alleges that Respondents violated Petitioner's due process rights by failing to preserve the blood samples, thus requiring dismissal of the administrative proceedings under *Trombetta/Brady*. Respondents filed a Motion to Dismiss Petitioner's 42 U.S.C. §1983 Complaint arguing that *Younger* abstention applied. **The District Court disagreed, concluding that because of**

***Trombetta/Brady*, the CHRB did not have a reasonable expectation of obtaining a valid conviction.** [EOR III, 696-698.] The District Court granted a preliminary injunction and then, on summary judgment, a permanent injunction in favor of Petitioner; and awarded attorney fees to Petitioner pursuant to 42 U.S.C. § 1988. [App. D, 19a.]

The CHRB appealed. The Ninth Circuit reversed and remanded the case with instructions to vacate the award of fees and to dismiss the action solely on jurisdictional grounds under *Younger* abstention. [App. A, 4a, 15a.] A petition for rehearing was denied. [App. B, 16a.] Thus, Petitioner respectfully presents this timely Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. *Younger* Abstention Should Not Be Applied Because State Administrative Procedures Did Not Provide A Timely Or Adequate Consideration Of The *Trombetta/ Brady* Constitutional Violations.

A. The Constitutional Due Process Requirements of *Trombetta/Brady* and 42 U.S.C. § 1983.

It is undisputed that the prosecuting State Agency, secretly and intentionally destroyed exculpatory evidence, the blood samples, the only evidence available to rebut presumptions relied on by the CHRB to support its accusation. The Due Process Clause of the Fourteenth Amendment mandates that states must preserve exculpatory evidence that is material to issues of guilt and/or punishment. [*Trombetta* at 485; *Brady* at 87.] **Further, a violation**

of this constitutional duty to preserve exculpatory evidence requires dismissal of the charges. [*Trombetta* at 487.] The Ninth Circuit's Decision ignores both principles in its reliance on *Younger* abstention. Obviously, an accused cannot have a fair hearing without evidence (intentionally destroyed by the prosecuting State Agency) which could prove his innocence, or mitigate against punishment. The Constitutional due process duty to preserve exculpatory evidence is applicable to administrative disciplinary proceedings by a state licensing agency to ensure the licensee a constitutionally full and fair administrative hearing. [*Scott v. Meese*, 174 Cal.App.3d 249, 256-257 (1985). See *Gibson v. Berryhill*, 411 U.S. 564, 567, 577 (1973).]

"The purpose of [42 U.S.C.] §1983 is to deter state [officials] from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief if such deterrence fails." [*Wyatt v. Cole*, 504 U.S. 158, 161, 118 L.Ed. 2d 504 (1992). Emphasis added.] Further, the Civil Rights Act of 1871, which is the origin of 42 U.S.C. §1983, was passed for the express purpose of enforcing provisions of the Fourteenth Amendment. [*Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934, 73 L.Ed. 2d 482 (1982).] In *Mitchum v. Foster*, 407 U.S. 225, 32 L Ed 2d 705 (1972), the Supreme Court stated that **"[t]he very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law."** [*Id.* at 242. Emphasis added.] The Supreme Court "long ago recognized that federal injunctive relief against a state court proceeding can in

some circumstances be **essential** to prevent great, immediate and irreparable loss of a person's constitutional rights." [*Id.* at 242, citing *Ex Parte Young*, 209 U.S. 123. Emphasis added.]

Thus, federal law, 42 U.S.C. §1983, allows a citizen to bring an action for injunctive relief against state officials who, while acting in their official capacities under color of state law, are depriving a citizen of federal constitutional rights. [*Office of Hawaiian Affairs v. Dept. of Education*, 951 F.Supp 1484,1492, 1493 (D. Haw. 1996), citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 103-105 (citing *Ex Parte Young,* 209 U.S. 123).] Such an injunction is required in this case, where Petitioner's constitutional right to defend himself is irrevocably lost, and his reputation is being irreparably damaged. Since available state remedies are patently inadequate, Plaintiff should be permitted to vindicate his constitutional rights in a federal forum. The District Court agreed with these principles in denying Respondents' Motion to Dismiss. [EOR III, 681, 696-700.]

B. *Younger* Abstention is the Exception, Not The Rule.

The Ninth Circuit relied on "*Younger* abstention" as the rule for determining jurisdiction of federal courts over ongoing state proceedings. [App. A, 13a. *Younger v. Harris*, 401 U.S. 37, 27 L.Ed. 2d 669 (1971).] However, *Younger* abstention is not the rule but "an **extraordinary** and **narrow exception** to the duty of a district court to adjudicate a controversy properly before it." [*Miofsky v. Superior Court (California)*, 703 F.2d 332, 338 (9th Cir. 1983).] In adopting 42 U.S.C. §1983, Congress intended "to provide a federal remedy where the state remedy, **though adequate in**

theory, was not available in practice." [*Monroe v. Pape*, 365 U.S. 167, 174 (1961). Emphasis added.] Such is clearly the case here. Petitioner will have to endure ongoing deprivation of his constitutional due process rights (a *Trombetta/Brady* dismissal), since there is in practice no adequate or timely state remedy.

1. The "Board" and The "Board of Stewards" Do Not Constitute a Competent State Tribunal on Constitutional Issues.

It is generally true, as the Ninth Circuit points out, that *Younger* abstention is applicable where the state proceedings interfered with (1) are ongoing, (2) implicate important state interests and (3) provide Petitioner an opportunity to litigate federal claims. [App. A, 6a.] While admittedly the state proceedings here were ongoing, and arguably (although not conceded)[13] important state interests are involved, the state proceedings simply do not provide an adequate or timely opportunity to litigate Petitioner's federal claim of constitutional violations. The state remedies are clearly inadequate because of the layered and redundant administrative proceedings under California Government Code §15117 (App. E, 22a) in which only "lip service" was given to Petitioner's constitutional due process claims, as evidenced by the Board of Stewards' Decision. Without citing any authority or reasons for denying Petitioner's Motion to Dismiss the proceedings

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[13] Petitioner asks rhetorically: If important state interests are involved in maintaining the integrity of horse racing, how is that interest advanced by discarding blood samples without testing before an accusation is filed against a trainer? Is preventing the trainer his constitutional right to challenge the State's evidence fostering the integrity of racing? The answer should be "NO."

pursuant to *Trombetta/Brady* (EOR I, 10 ¶25), the Stewards concluded:

> While the Stewards are concerned about the circumstances leading to Truesdail Laboratories randomly discarding blood samples, it is our position that the lack of blood samples do not warrant a dismissal of the case before us. [EOR I, 55.]

In *Gibson v. Berryhill* this Court concluded that *Younger* "presupposes the opportunity to raise and have **timely** decided by a **competent state tribunal** the federal issues involved." [411 U.S. at 577. Emphasis added.] Here, the layered administrative proceedings before the CHRB will not result in a **timely** decision, and the CHRB has demonstrated that it is not a **competent state tribunal** to rule on constitutional matters.

The Agency judges (the "Stewards" and the "Board") consist of lay persons who are unqualified to express an independent and knowledgeable ruling on federal constitutional issues. The same law office prosecuting Petitioner, the State Attorney General's office, is also counsel to the Board and its Stewards, who rely on that office for advice on legal issues. Under these circumstances, the only competent figure to rule on constitutional issues in these administrative proceedings is a federal judge. Not even an administrative law judge would suffice, since that judge's "proposed" decision is ultimately reviewed by lay people, the Board. In the meantime, Petitioner, and other licensees, would continue to suffer damage to their reputations and face enormous expenses in defense of layered administrative proceedings without the benefit of exculpatory evidence destroyed by the CHRB.

The Ninth Circuit's Decision is premised on the *Younger* concept that federal courts should not interfere with ongoing state proceedings, if the state proceedings can sufficiently protect constitutional rights. [App. A, 9a-13a. *Younger,* 401 U.S. at 40-46.] *Younger* abstention therefore rests on an assumption that state proceedings would invariably uphold civil rights – an assumption rejected by *Mitchum v. Foster*, 407 U.S. at 241-243, and obviously untrue here.

2. *Younger* Abstention Does Not Provide For a Timely Review of the Constitutional Issue.

The Supreme Court in *Younger* recognized that irreparable injury will be caused if the challenged action is "flagrantly and patently violative of express constitutional prohibitions." [*Younger,* 401 U.S. at 53; see also *Butler v. Alabama Judicial Comm.*, 245 F. 3d 1257 (11th Cir. 2001).] *Butler* reasoned that for a federal court to defer to state process **that process must "permit a reasonably speedy review of federal constitutional issues."** [*Id.* at 1264. Emphasis added.] The layered proceedings under Government Code §11517 do not permit Petitioner a reasonably speedy review of the federal issues he raised "flagrantly and patently violative of express constitutional prohibitions" (*Trombetta/ Brady*), and do not ensure that his reputation will not continue to be damaged while he undergoes additional administrative hearings at enormous expense without benefit of the exculpatory evidence intentionally destroyed by the CHRB.

The layered administrative proceedings in this case following the Stewards' decision could result in at least three more evidentiary hearings. The appeal from the Stewards' decision would be assigned to the Office

of Administrative Hearings for a trial de nova before an administrative law judge ("ALJ"). Since the ALJ's decision after a full hearing is only a "proposed decision," it would be reviewed by the Board which can either adopt the decision (in which case it would be the final decision of the agency), or the Board could remand the case back to the ALJ for further evidentiary hearings (perhaps one or two times). Thereafter, the Board could reject the ALJ's proposed decision and decide the case itself on review of the record of the Stewards' Hearing. [Gov't Code § 11517. App. E, 22a.] When the administrative process is completed, and only then, could Petitioner file a writ in the California courts to review de nova the final administrative decision. For these reasons, the District Court found that the constitutional violation of the duty to preserve the exculpatory blood samples and the resulting denial of Petitioner's due process right to fair hearings before the Agency, constituted a continuing violation, giving rise to the issuance of a permanent injunction under 42 U.S.C. §1983. [EOR VI, 1357-1362.]

Petitioner will suffer hardship from delayed judicial review in that his reputation as a trainer will continue to suffer[14] while he is required to defend the ongoing administrative proceedings without the benefit of exculpatory evidence which the CHRB intentionally destroyed. Petitioner should not be forced to wait for a

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[14] *Gibson* also noted that the District Court's finding that "the revocation . . . . of appellees' license . . . 'together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage' to the appellees for which no adequate remedy is afforded by state law." [411 U.S. at 577, fn. 16.] An almost identical situation is present here.

final decision by the CHRB before seeking judicial review of his constitutional claims.[15] Petitioner did not and could not receive a fair Stewards' hearing. Thus it makes little sense to require final action by the State Agency, the CHRB, since part of the harm suffered here is occasioned by the laborious failed procedure and the constitutionally flawed and unfair proceedings. The *Younger* abstention doctrine should not be allowed to defeat a 42 U.S.C. §1983 action where the lack of a **timely** judicial review by the state courts of the constitutionality of the administrative proceedings impacts the adequacy of the state forum.

The Ninth Circuit addressed Petitioner's claims that California's administrative procedures [Gov't Code §11517] are "inadequate" because the agency proceedings are "layered and redundant" and do not provide a "timely" resolution of the federal issues. The Ninth Circuit concluded:

> [5]... As the Supreme Court has made clear, only when the timeliness issue amounts to a procedural bar do we decline to abstain due to inadequacy of the forum. *Pennzoil Co.*, 41 U.S. at 15. Although there are instances in which timeliness plays a role in the adequacy of the state forum, Plaintiff's case is not one of them. [App. A, 12a.]

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[15] Petitioner cannot raise this issue any sooner in the State Court because review by writ of mandate there is not available until all administrative remedies have been exhausted. [*Abelleira v. District Court*, 17 Cal. 2d 280, 292 (1941). See *Board of Med. Quality Assur. v. Superior Court*, 73 Cal.App. 3d 860 (1977) (even if there is a claim of denial of due process).]

Petitioner respectfully disagrees. The United States Supreme Court stated in *Gibson* that since *Younger* "contemplates the outright dismissal of the federal suit, and presentation of [the federal] claims . . . to the state courts . . . such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal, the federal issues involved." [411 U.S. at 577. Emphasis added.] Patently the multilayered state administrative system of lay judges prohibits a timely consideration of the constitutional issues of *Trombetta/Brady* here.

The Ninth Circuit suggests that since Petitioner will ultimately have the chance to bring his federal claim "to the Superior Court in a writ of mandate," there is no procedural bar in this case. [App. 11a-13a.] **This may be true in theory, but it is neither timely nor adequate in practice**. "Timely" in this context, destruction of exculpatory evidence, means consideration and dismissal of the charges before trial. [*Trombetta*, 467 U.S. at 487.]

By the time all the costly administrative proceedings will have occurred, the right to have the accusation dismissed before trial for the *Trombetta/Brady* violation will be lost. This is the gravamen of Petitioner's 42 U.S.C. §1983 action; and Petitioner submits, effectively amounts to a bar to the full measure of the protection of his constitutional rights. For this reason as well, *Younger* abstention is not appropriate in this case.

"The very purpose of §1983 [is] to interpose the federal courts between the states and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action under color of state law." [*Mitchum v. Foster*, 407 U.S. at 242.] This is the

reason the federal courts have jurisdiction to enjoin state proceedings which are violative of federally protected constitutional rights.

II. The Ninth Circuit Failed To Consider The Impact Of *Trombetta/Brady's* Constitutional Violation On The Exceptions To *Younger* Abstention (Bad Faith And The Existence Of Extraordinary Circumstances).

The Ninth Circuit recognized that the district courts are not obliged to decline jurisdiction "if the [state] proceedings are conducted in **bad faith** or...**other extraordinary circumstances exist.**" [App. A, 13a. Emphasis added.] The Ninth Circuit concluded however that neither "exception" applies in this case. [App. A, 13, 14a.] This ruling ignores the *Trombetta/Brady* constitutional violation and its impact on the bad faith and extraordinary circumstance exceptions to *Younger* abstention, and is inconsistent with the decision of the Ninth Circuit in *Mannes v. Gillespie* and the Supreme Court's decision in *Gibson v. Berryhill*.

A. Bad Faith Exists in This Case.

The Ninth Circuit correctly sets forth the standard for "bad faith" under *Younger*:

> In the *Younger* abstention context, bad faith "generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 126 n. 6 (1975). [App. A, 13a.]

The Ninth Circuit however erred in concluding that Petitioner did not "meet that standard." The Ninth Circuit reasoned that "the Board had a reasonable expectation of obtaining a valid 'conviction,'" under the

Trainer Insurer Rule based on the "positive urine test" and the presumptions relied on by the CHRB pursuant to C.C.R. §1843(d) (App. F, 29a), that the positive urine "was prima facie evidence that the trainer had been negligent in the care of his horse...and that the drug...had been administered to the horse." [App. A, 14a.]

This conclusion, however, ignores the impact of the *Trombetta/Brady* violation on the State's case, particularly the presumptions relied on by the CHRB. Obviously, a "valid" conviction is one based on the entire case, including the licensee's theory and evidence, not just the prosecution's theory and "prima facie" evidence. Under *Trombetta/Brady*, if the prosecution fails to preserve exculpatory evidence, the case must be dismissed and therefore no trial occurs. [*Trombetta* 467 U.S. at 487.] Thus, the CHRB could not possibly obtain a valid conviction in this case, much less entertain a "reasonable expectation" of victory after intentionally destroying the blood samples in violation of *Trombetta/Brady*. This was the result in *Mannes v. Gillespie* [967 F.2d at 1312], and this should have been the result in this case.[16] **There could never be a "valid" conviction in this case, because the *Trombetta/Brady* violation requires dismissal before trial.**

The fact that the CHRB secretly destroyed both blood samples in violation of the U.S. Constitution *(Trombetta/Brady),* and did not comply with its own contract and the state horse racing law, strongly suggests (if not conclusively establishes) that the CHRB acted in bad faith. How can a licensee have a fair trial without evidence supporting the defense theory? **Prosecuting**

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[16] *Mannes v. Gillespie* is discussed in detail at pp. 27, 28.

such cases where the State Agency destroyed exculpatory evidence is "bad faith."

The Ninth Circuit's Decision is also in direct conflict with the conclusion of the United States Supreme Court's decision in *Gibson v. Berryhill*. The Supreme Court held that the district court was not obligated to follow *Younger* and decline jurisdiction of plaintiff's 42 U.S.C. §1983 action because the administrative judges were "biased." [411 U.S. at 577.] Bias, as the Ninth Circuit recognized (App. A, 14a), is essentially an issue of bad faith. Its presence undermines any reasonable expectation of obtaining a valid conviction, just as the *Trombetta/Brady* issue undermines any reasonable expectation of obtaining a valid conviction in this case.

In addition, the Ninth Circuit's Decision ignores the issue of mitigation of "punishment" under *Trombetta/Brady* and its impact on the "reasonable expectation of obtaining a valid conviction." ***Brady* extended constitutional protection to issues of punishment**. [*Brady,* 373 U.S. at 87.] The Ninth Circuit discussed bad faith only in the context of guilt. [App. A, 13-14a.] Lost evidence, however, can diminish or destroy proof of mitigating circumstances on issues of punishment, not just on questions of guilt or innocence.

Since imposition of penalties are discretionary under the Trainer Insurer Rule (App. F, 37a), mitigating circumstances are significant punishment issues in these cases. [App. F, 38a, 40a.] As a result of the *Trombetta/Brady* violation, Petitioner was prevented from producing scientific evidence that there was no administration of the prohibitive substance by Petitioner, rather, its presence in the horse was the result of

accidental environmental contamination, significant mitigating circumstances. [*Supra*, pp. 12, 13.] It must follow, therefore, that the accusation should have been dismissed for this reason. The loss of mitigating circumstances undermines any reasonable expectation of the CHRB in obtaining a valid conviction. Contrary to the Ninth's Circuit conclusion, Petitioner has met the "bad faith standard" in this case. The District Court's exercise of jurisdiction did not violate *Younger*.

B. Existence of Extraordinary Circumstances in This Case Allowed the District Court to Properly Exercise Jurisdiction Even If the Criteria for *Younger* Abstention Were Met.

The Ninth Circuit concluded in its Opinion:

> (b) *There are no extraordinary circumstances.*
>
> Plaintiff's claim of "extraordinary circumstances" is rooted only in the claimed constitutional violation. As discussed earlier, the constitutional dimension of the error claimed does not, by itself, constitute an exception to the application of *Younger* abstention. "Extraordinary circumstances" have not been cataloged fully, **but Plaintiff's case does not approach the example referred to in *Younger*.** *See Aiona v. Judiciary of Haw.*, 17 F.3d 1244, 1248-49 (9th Cir. 1994). ("For example, if a statute 'flagrantly and patently' violates 'express constitutional prohibitions in every clause, sentence and paragraph,' then federal intervention in state court proceedings is appropriate." (quoting *Younger*, 401 U.S. at 53.)) [App. A, 14a. Emphasis added.]

Petitioner adds, neither do any of the other cases finding "extraordinary circumstances."[17] In *Mannes v. Gillespie*, 967 F. 2d 1310 (1992), the Ninth Circuit recognized that a state prosecution which violates the Double Jeopardy Clause, presents an exception to the general rule of *Younger* abstention. [*Id.* at 1312.] Double jeopardy, the Court reasoned, is a **constitutional threshold issue**, which calls for **dismissal** of the accusation without trial. "Because full vindication of the [double jeopardy] right necessarily requires intervention before trial," *Mannes* concluded that "federal courts [could] entertain pretrial habeas petitions that raise a colorable claim of double jeopardy." [*Id.* at 1312.] *Mannes* presented a **threshold issue of constitutional proportions**, "double jeopardy," just as Plaintiff's §1983 action here presented a **threshold issue of constitutional proportions**, a violation of *Trombetta/Brady.* **To give effect to the constitutional violation, both cases require dismissal before trial.** *Mannes* held that because the constitutional violation could bar by dismissal the criminal proceedings (retrial), this presented an exception to the *Younger* abstention principle. [*Id.* at 1312.] The same is true in Petitioner's case. Because the constitutional violation *(Trombetta/ Brady)* could bar by dismissal the remaining administrative proceedings, this presented an exception to *Younger* abstention. Both constitutional violations,

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[17] *Younger* recognized that it may be appropriate to enjoin state criminal proceedings on a "showing of bad faith, harassment or **any** other unusual circumstance that would call for equitable relief." [401 U.S. at 54. Emphasis added.] See also *Gilliam v. Foster*, 63 F. 3d 287, 289 (4th Cir. 1995) ("double jeopardy"); and *Gibson v. Berryhill,* 411 U.S. at 577 (potential "bias" of the lay administrative judges).]

double jeopardy and the *Trombetta/Brady* destruction of exculpatory evidence constitute extraordinary circumstances, even though they do not meet the extreme factors of the Ninth Circuit's quoted example in *Younger*. [App. A, 14a.]

Despite *Younger's* recitation of such an obvious and extreme example of extraordinary circumstances, the Court in *Younger* specifically left the matter open for expansion, stating: "Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be." [401 U.S. at 54.]

Petitioner respectfully submits that even if "constitutional attack[s] on state procedures...do not automatically vitiate" the application of *Younger* abstention, as the Ninth Circuit concluded in its Opinion [App. A, 9a], this does not mean that a constitutional issue cannot be the basis for federal jurisdiction ("extraordinary circumstances") even in light of *Younger* abstention. That is exactly what occurred in both *Mannes v. Gillespie* and *Gibson v. Berryhill.*

The Ninth Circuit's Decision is in direct conflict with the principles of this Court's decision in *Gibson v. Berryhill.* The Supreme Court held that the district court was not obligated to follow *Younger* and decline jurisdiction of Plaintiff's 42 U.S.C. § 1983 action because the administrative judges were "biased." [411 U.S. at 577.] Bias in the context of *Gibson* prevented Plaintiff from having a constitutionally fair administrative proceeding and constitutes "extraordinary circumstances" just as the *Trombetta/Brady* issue here undermines any reasonable possibility of having a fair administrative trial in this case.

CONCLUSION

This case presents a question of exceptional importance affecting not only Petitioner, but all trainers and owners of thoroughbred race horses in California and the thousands of employees who rely on the trainers' licenses for their livelihood. That question is the Constitutional right to have access to scientific evidence in the State Agency's possession, blood samples from their horses, to question and rebut unquantitative urine test results and regulatory presumptions of the effect of urine test results relied on by the Agency in enforcing the Trainer Insurer Rule.

"The purpose of [42 U.S.C.] §1983 is to deter State [officials] from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief if such deterrence fails." [*Wyatt v. Cole*, 504 U.S. at 161. Emphasis added.]

The random and intentional destruction of blood samples by the CHRB will force trainers to accept an administrative penalty which may destroy their stable and end their career even though their constitutional rights to due process *(Trombetta/Brady)* have been trampled in the CHRB's grossly unfair administrative proceedings. While the state court remedy (a writ of mandate after all administrative hearings and appeals have been exhausted) may be "available in theory, it is not available in practice." [See *Monroe v. Pape,* 365 U.S. 167, 174 (1961).] To many trainers then, the remedy of appeal to the state court at the conclusion of all the layered administrative proceedings is not available in practice, but in theory only.

Petitioner respectfully submits that the Ninth Circuit erred in its failure to address the impact of the *Trombetta/Brady* constitutional violation on the issues of bad faith and extraordinary circumstances in applying *Younger* abstention.

The secret and intentional destruction of both blood samples in violation of state law, the CHRB's publicly bid contract and particularly the constitutional violation of the principles of *Trombetta/Brady* (the duty to preserve potential exculpatory evidence), constitute both "bad faith" and "extraordinary circumstances" allowing the District Court to exercise jurisdiction in this case, even if all the criteria of *Younger* abstention are met. This breach of constitutional duty required a dismissal before trial. Thus, the CHRB's action was obviously brought in bad faith, i.e., "without a reasonable expectation of obtaining a valid conviction."

The conflict of the Ninth Circuit's Opinion with its own decisions and the decisions of the United States Supreme Court, and the fact that this case involves a question of exceptional importance to citizens engaged in the horse racing industry, require this Honorable Court to grant Certiorari and review the Ninth Circuit's Decision. Upon such review the law, constitutional principles and common sense require reversal of the Ninth Circuit's Decision and restoration of the Judgment of the District Court.

October 10, 2003 Respectfully submitted,

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